SUPPORTING BRIEF

Specifications of Error

The petitioner assigns the following errors in the record and proceedings of said cause:

The United States Circuit Court of Appeals for the Third Circuit committed fundamental error in affirming the judgment of the trial court because:

(1) The inalienable writ of habeas corpus has been suspended and withheld as a penalty for petitioner's failure to obey an illegal order of the draft boards so as to deny judicial review of the unconstitutional and illegal action of the boards upon which the indictment is based, contrary to 28 U. S. C. sections 451-464 and Clause 2 in Section 9 of Article I of the United States Constitution.

(2) The facts and circumstances were so exceptional, extraordinary and unusual, presented a clear and present danger of irreparable and inescapable injury, and an immediate need for the writ of habeas corpus, together with a complete absence of the right to urge the invalidity of the order on which the prosecution is based in defense to the indictment or upon appeal, that it was the duty of the district court to grant the writ and hold a hearing on the invalidity of the draft board's order prior to the trial of the indictment.

(3) The writ of habeas corpus is the only legal remedy available to the petitioner in order to avoid the ordeal of having to undergo a trial in execution of an act of attainder in the district court by denial of his right to be heard in his

own defense, contrary to Clause 3 in Section 9 of Article I of, and the due process clause of the Fifth Amendment to, the Constitution of the United States.

(4) Petitioner is in custody by color of the authority of the United States and committed for trial before the United States District Court in violation of the Constitution and laws of the United States upon an indictment based upon an illegal order of the draft board which is contrary to law, contrary to the undisputed evidence that petitioner is exempt from duty under the Act, without support of substantial evidence that he is under duty for training and service under the Act, made in violation of the due process clause of the Fifth Amendment and arbitrary and capricious.

(5) The criminal sanctions clause of the Act and the Regulations have been construed by the courts so as to deny to the petitioner his right to show that the order upon which the indictment is based is void, thereby violating the due process clause of the Fifth Amendment to the Constitution, transferring the judicial powers of the courts to the draft boards contrary to Article III of the Constitution and converting the Act into a Bill of Attainder contrary to Section 9 of Article I of the United States Constitution.

For each of the above reasons the judgment of the Circuit Court of Appeals for the Third Circuit should be reversed together with the judgment of the district court.

ARGUMENT

The history of the writ of habeas corpus, the express provision of the Constitution securing it to the people, the statutes which implement the constitutional guarantee and the absence of any language in the Act in question denying the writ expressly as a means of judicial review of the illegality of the draft board order, together with the construction placed on the Act in the *Falbo* case, dispel any intention or implication of Congress to withhold the remedy until compliance with the order and makes imperative the allowance of the writ to review the cause of petitioner's detention.

The great and arbitrary powers assumed and granted to the sheriffs in England in ancient times were usurped by an abuse of ill-defined discretion. They were thereby empowered to arrest and hold persons on suspicion without commitment or by order of star chamber proceedings. The intolerable abuses of the criminal process of the law of the land led to the invention by the chancery of writs commanding the production of the body of the person detained. The writ was first called the *writ de homino replegiando*, and later became known as the writ of habeas corpus. The writ of habeas corpus was issued before the Magna Charta under the name of *de odio et atia* and is specifically mentioned in Article 36 of the Magna Charta which provides that it shall "not be refused". During these periods it played an important part in enabling a person to avoid trials by ordeal and by battle in violation of the right to a judicial trial. During the reign of Charles I, the king and his judges completely lost their reasons and balance. This was due to the weakness of the king, who yielded to ill-advised ministers and who was badly served by subservient judges. The warden of the Fleet Prison had made returns to writs of habeas corpus, stating that the prisoners, in whose behalf they had

been obtained, were confined by warrant of the privy council or committed by special command of the king. Though counsel for the prisoners insisted that the council was bound to assign a sufficient cause of commitment, just as any petty magistrate would be, the judges decided that the royal mandate was warrant enough for any arrest and detention.

This same view was taken by the higher judges in *Darnel's Case* in 1627. The House of Commons thereupon passed resolutions to the contrary, and after a conference with the House of Lords the measure known as the Petition of Right was passed in 1627. (3 Car. I, c. i) In section 5 of this Act are recited the above facts, and it was enacted "that no freeman in any such manner as is before mentioned be imprisoned or detained". Later, in 1641, by Act abolishing the Star Chamber, the right to the writ of habeas corpus was given to test the legality of commitments by command or warrant of the king or the privy council.

The reign of Charles II was marked by further progress of the use of the writ of habeas corpus. Lord Clarendon was impeached for causing many persons to be imprisoned against the law and to be conveyed in custody to places outside of England. During 1679, in consequence of Clarendon's arbitrary proceedings, a new bill was introduced which passed both Houses and became the famous Habeas Corpus Act of 1679 (31 Car. II, c. 2).[2]

"The great writ of habeas corpus has been for centuries esteemed the best and only sufficient defense of personal freedom. In England after a long struggle it was firmly guaranteed by the famous Habeas Corpus Act of May 27, 1679, 'for the better securing of the liberty of the subject,' which, as Blackstone says, 'is frequently considered as

[2] The above statement on history of the writ compiled from Holdsworth, *History of the English Law*, vol. 9, p. 108-125; *Encyclopaedia Britannica*, 1942, Vol. 11, p. 53; *The Encyclopedia Americana*, 1942, Vol. 13, pp. 602-604; Cooley, *Constitutional Limitations*, 8th ed., vol. 1, pp. 709-728; *Watson on the Constitution*, Vol. 1, pp. 721-733; *Kent's Commentaries*, 12th ed. (Holmes) Vol. 2, pp. 32-42.

another *Magna Charta.*' It was brought to America by the colonists, and claimed as among the immemorial rights descended to them from their ancestors. Naturally, therefore, when the confederated colonies became united states, and the formation of a common government engaged their deliberations in convention, this great writ found prominent sanction in the Constitution. That sanction is in these words: 'The privilege of the writ of habeas corpus shall not be suspended unless when in cases of rebellion or invasion the public safety may require it.'

"The terms of this provision necessarily imply judicial action. In England, all the higher courts were open to applicants for the writ, and it is hardly supposable that, under the new government, founded on more liberal ideas and principles, any court would be, intentionally, closed to them.

"This brief statement shows how the general spirit and genius of our institutions has tended to the widening and enlarging of the habeas corpus jurisdiction of the courts and judges of the United States; and this tendency, except in one recent instance, has been constant and uniform; and it is in light of it that we must determine the true meaning of the Constitution and the law . . .

"These considerations forbid any construction given to doubtful words the effect of withholding or abridging this jurisdiction. They would strongly persuade against the denial of the jurisdiction even were the reasons for affirming it less cogent than they are." (*Ex parte Yerger,* 8 Wall. 85, 95-96, 102-103; and compare *Bridges* v. *State of California,* 314 U. S. 252, 264-266)[3]

In 1789 the writ of habeas corpus was first spoken of by the legislature when Congress passed the Act of September 24 (1 S. L. 81) to implement the provisions of the Constitution. The power was extended again by the Act of March 2, 1833, and again by the Act of August 29, 1842. The

[3] Mr. Justice Stone exhaustively reviews the history, law and constitutional provisions on the subject in *McNally* v. *Hill,* 293 U. S. 131, 135-139, to which reference is here made.

Act of February 5, 1867, expanded the right to the writ to its present use. Section 14 of the Act of 1789, *inter alia* provides that the writ shall extend to cases where prisoners are in custody by authority of the federal government and "are committed for trial before some court of the same". The provisions of the original act and the various amendments are now incorporated in Chapter 14 of the United States Code, sections 451 to 466.

In *Ex parte Watkins*, 3 Pet. 193, this court described the writ as "a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause".

The views of Mr. Justice Holmes expressed in his dissent in *Frank* v. *Magnum*, 237 U. S. 309, now appear to have been adopted by this court. In that case, at page 345, he said: " . . . habeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and, although every form may have been preserved, it opens the inquiry whether they have been more than an empty shell." This perspective was reflected by the opinion in *Mooney* v. *Holohan*, 294 U. S. 103, 113, where it is declared that the writ was the "historical remedial process when one is deprived of his liberty without due process of the law in violation of the Constitution of the United States". Later, in *Johnson* v. *Zerbst*, 304 U. S. 458, this court held that the writ was intended to be preserved, not destroyed; that it was not narrowed, but expanded, by the Constitution and Congress; that it went outside the record and looked behind the forms; that the procedure thereon had been liberalized. The court held it must be alert to examine for itself. The Chief Justice in *Bowen* v. *Johnston*, 306 U. S. 10, declared that it was a precious safeguard of liberty and was available to release the prisoner when there is no offense shown to have been committed. He said that upon this court falls "no higher duty than to maintain it unimpaired".

(P. 26) Again, at page 27, he said: "But it is equally true that the rule is not so inflexible that it may not yield to exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent."

In *Walker* v. *Johnston*, 312 U. S. 275, the court declared: "As we have said in *Johnston* v. *Zerbst*, 304 U. S. 458, Congress has expanded the rights of a petitioner on habeas corpus." (P. 285) Sustaining the claim for the writ, in *Smith* v. *O'Grady*, 312 U. S. 329, Justice Black referred to the writ as the great "historic remedy", thus echoing the views of the court expressed in prior cases. Speaking in *Holliday* v. *Johnston*, 313 U. S. 342, Mr. Justice Roberts stated: "a petition for the writ of habeas corpus ought not be scrutinized with technical nicety"; and further, "we have recently emphasized the broad and liberal policy adopted by Congress respecting the office and use of the writ of habeas corpus in the interest of the protection of individual freedom to the end that the very truth and substance of the cause of a person's detention may be disclosed and justice be done."

Similarly in *Waley* v. *Johnston*, 316 U. S. 101, the court extended the writ and broadened its scope so as to permit a full inquiry into facts entirely *dehors* the record to show the illegality of a plea of guilty, thus placing the plea on the same footing as a confession obtained in the same manner by force and duress. It was said: "In such circumstances the use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights." (Pp. 104-105)

The circumstances under which the writ of habeas corpus lies has been aptly summarized in *Graham* v. *Squier*, 132 F.

2d 681 (CCA 9th), where it was held to be available in all cases of illegal imprisonment for whatever cause and under whatever pretense. See also the dissenting opinion by Judge Haney in *Zimmerman* v. *Walker*, 132 F. 2d 442, at page 447. Compare *Cochran* v. *Kansas*, 316 U. S. 255, 256-258, and *Pyle* v. *Kansas*, 317 U. S. 213, 215-216. In the *Pyle* case the writ issued because the conviction was alleged to have been obtained on perjured testimony for the state and the illegal suppression of defendant's evidence.

In the dissenting opinion in the case at bar Judge Biggs said: "It is clear that a registrant is deprived of his liberty when he is arrested because he fails to report for induction. The restraint is wrongful if the order of the draft board violated by the registrant was invalid, unless it be true that the Selective Training and Service Act provides that the order must be obeyed in any event and under any circumstances. The Act, however, does not so provide." (138 F. 2d 100, 103; R. 15)

The holding in *Falbo* v. *United States*, No. 73 October Term, 1943, decided January 3, 1944, is confined exclusively to the denial of the defense of invalidity of the order to indictments prosecuted in criminal cases. It cannot be said that the Act or that opinion circumscribed the jurisdiction of the federal courts in habeas corpus actions. Indeed habeas corpus was recognized in the *Falbo* opinion as available to review a classification after induction; and, of course, there is nothing in the decision from which it can be inferred that the writ could be denied one who has been illegally incarcerated under Section 11 of the Act, either by commitment for trial or judgment of conviction. Although the scope of judicial review under the writ of habeas corpus is guaranteed by the Constitution and needs no legislative declaration, Congress has seen fit to implement the constitutional provisions with strong statutes favoring the writ. The writ cannot be suspended by the courts at any time, and the executive can do so only by express enactment of Congress,

which authority is confined to cases "of rebellion or invasion" where "the public safety may require it". (*Watson on the Constitution*, Vol. 1, pp. 724-729) It cannot be suspended by express law of Congress or construction of statutes by the courts in order to facilitate the war effort or to speed the raising of an army. *Ex parte Milligan*, 4 Wall. 1-125; *Ex parte Quirin*, 317 U. S. 1.

Neither Congress nor the Constitution imposes any restrictions or conditions as to the time of the illegal restraint, nor do they inflict any penalties against the person unlawfully imprisoned by denying the writ because the person refused to obey the administrative agency or other authority that causes the restraint. The prisoner is entitled to judicial review by writ of habeas corpus at any time, when the question cannot be otherwise reviewed, when it is shown that the detention is either "by color of the authority of the United States", or the person "is in custody for an act done or omitted in pursuance of a law of the United States", or "is in custody in violation of the constitution . . . of the United States". 28 U. S. Code, Sec. 453. It should be noticed that failure to report for induction under the Act and Regulations is "an act . . . omitted in pursuance of a law of the United States" within the express meaning of the code.

By Section 452 of 28 U. S. Code the federal courts are given "power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty". Section 461 of Title 28 confers broad jurisdiction upon the courts, after a hearing of the writ, by providing that the court must thereupon "dispose of the party as law and justice require". The broad and beneficent provisions support the conclusions of Judge Biggs in his dissent here and the opinion of Judge Yankwich in *Ex parte Stewart*, 47 F. Supp. 410, where, at page 414, on the precise problem presented here, it is said: "In other words, my view is that, if an inductee is restrained of his liberty, in consequence of what he alleges to be the arbitrary action of a Selective

Service Board, *no matter at what state he is restrained,* he may, by writ of habeas corpus, question whether there was evidence to sustain the action of the board. He does not have to wait until he is inducted, and direct his writ to the Commanding Officer. Nor does he have to risk conviction, desertion or court-martial." See also the opinion of the district court in *Goodwin* v. *Rowe,* 49 F. Supp. 703, reaching the same conclusion.

Accordingly, since Congress enacted the Selective Training and Service Act of 1940 and failed to provide an express declaration nullifying the availability of the writ and denying judicial review of illegal action of the board to one who refused to report for induction, it cannot be said that Congress intended to penalize such person by withholding the benefits of the writ. Chapter 14 of Title 28 of the United States Code was not repealed by the passage of the draft act. It must be assumed that the Congress intended that persons proceeded against or convicted under the Act would be equally entitled to the writ of habeas corpus as are persons illegally proceeded against or convicted under any other law of the United States. This court must not impute to Congress the intention of repealing the habeas corpus statutes when it passed the draft act. Repeals by implications are not favored, and a repeal will not be implied unless there be an irreconcilable conflict between the words expressed in two statutes. *Petri* v. *Creelman Lumber Co.,* 199 U. S. 487; *Wood* v. *United States,* 16 Pet. 362; *State* v. *Stoll,* 17 Wall. 430.

It cannot be argued successfully that the writ should be denied as a penalty for failure to report for induction. To sustain such a contention would obviously for ever preclude the courts from inquiring into the illegality of the restraint of a prisoner because it is impossible for the induction process to place him in military custody when he has been reported to the district attorney as a delinquent. Thereafter he is subject, according to the Act, only to the

jurisdiction of the Department of Justice to be dealt with according to law. This argument leads to penalizing the petitioner by suspending the writ contrary to Clause 2 in Section 9 of Article I of the United States Constitution. This court early in its life held this provision to be a restraint upon judicial action. (*Ex parte Yerger*, 8 Wall. 85, 95-96, supra pp. 10, 17, this brief).

The strong constitutional provision securing the inalienable writ of habeas corpus necessarily precludes this court from giving to the statute a construction which denies the writ of habeas corpus contrary to the constitution. It is the duty of this court to construe the Selective Training and Service Act of 1940 which does not mention the writ of habeas corpus, together with the habeas corpus statutes (28 United States Code, Sections 451 to 464), in such a manner as to avoid unreasonable, penalizing or unconstitutional results. *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 351-352, where it is said: " . . . the provision should not be construed as demanding the performance of a task, if ultimately found to be inherently impossible, as a condition of relief to which the claimant would otherwise be entitled." *United States* v. *Kirby*, 7 Wall. 482, 486-487.[4] To require the petitioner to report for induction after he has been declared delinquent and arrested is to impose the performance of an impossible condition.

This court's conclusions in the *Falbo* case withholding judicial review of the illegal draft board order in defense to the indictment does not support the conclusion of the courts below. In that case the court simply construed the statute by imputing to Congress the intent of denying said defense. Apparently this court considered the general provisions of the *due process* clause of the Fifth Amendment were not strong enough to preclude this court from thus construing the criminal sanctions clause of the Act and

[4] *Ex parte Cohen*, 254 F. 711; *Delaware & Hudson Co.* v. *Albany & Susq. R. Co.*, 213 U. S. 435.

impliedly held that this interpretation placed on the clause did not bring it into collision with the Constitution. Whatever are the considerations and grounds that might have led to the conclusions reached in the *Falbo* decision these are not sufficient reasons for the denial of the writ of habeas corpus to petitioner. The specific and strong provision of the habeas corpus clause of the First Amendment definitely rejects any such straining of the construction powers of the court concerning Acts of Congress challenged before the court. *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 638-640; *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, note 4.

There is no legislative prohibition in the Selective Training and Service Act which denies application of the board and liberal provisions of the habeas corpus statutes or the Constitution. In the *Falbo* case this court held directly that the petition for writ of habeas corpus *is* available to determine whether or not the selectee is liable for training and service or inducted lawfully into the armed forces. Even where individuals have been convicted by court-martial proceedings it has been repeatedly and unanimously held that the writ of habeas corpus is available to the prisoner in the district court to inquire into the status of the petitioner and legality of the proceedings whereby it is claimed he is subject to jurisdiction of the armed forces. *Ex parte Reed*, 100 U. S. 13; *In re Grimley*, 137 U. S. 147; *In re Morrissey*, 137 U. S. 157; *Johnson* v. *Sayre*, 158 U. S. 109; *Givings* v. *Zerbst*, 255 U. S. 11, 20; *Crowell* v. *Benson*, 285 U. S. 22, 58; *Ex parte Cain*, 39 Ala. 440, which latter case involved a minister of religion.

In *Ver Mehren* v. *Sirmeyer*, 36 F. 2d 876 (CCA 8), it was held that the petitioner was entitled to a discharge under court-martial proceedings where it appeared that he had not been legally inducted and that the Selective Service Regulations under the Selective Service Act of 1917 had not been followed. See also *Ex parte Milligan*, 4 Wall. 1-125.

In the *Ver Mehren* case, supra, "The court thus went behind the court-martial back to the Board, and having found that the Board had improperly inducted him, wiped out the court-martial conviction entirely. In other words, after the petitioner had actually been convicted by court-martial, the Court proceeded to review, not his conviction, but the legality of the action of the Selective Service Board, in inducting him, in the first instance." (*Ex parte Stewart,* 47 F. Supp. 410)

To now construe the statutes so as to penalize the petitioner by withholding from him the writ of habeas corpus because he held the draft boards in contempt for their violation of the law is to arbitrarily and capriciously discriminate against those who claim their legal rights in favor of subservient persons who comply with the illegal orders of draft boards. This discrimination cannot be allowed and the court will not permit the denial of the habeas corpus provisions of the statutes and the constitution because such would be the imposition of penalties so as to convert the statutes into a dragnet. *United States* v. *Shackford,* 5 Mason 445; *Bank of Columbia* v. *Okely,* 4 Wheat. 235; *United States* v. *St. Paul M. & R. Co.,* 247 U. S. 310, 313. The construction given the statutes by the court below reads into them something that is not there, and constitutes mind-reading of the members of the Congress, contrary to the established doctrine of this court which forbids such improper feats. To thus read the mind of Congress is to substitute *construction* for legislation and amounts to judicial legislation. *United States* v. *Missouri Pac. R. Co.,* 278 U. S. 269; *United States* v. *Felt & Tarrant Mfg. Co.,* 283 U. S. 269. The specific terms of the habeas corpus statutes securing the writ prevail over the reading between the lines of the Selective Training and Service Act of 1940 done by the court below so as to deny the conclusion reached. *Kepner* v. *United States,* 195 U. S. 100.

The line of cases holding that the writ of habeas corpus is not available in advance of the trial under an indictment does not control here because these cases proceed on the theory that it is within the discretion of the court to refuse the writ where it appears that the same matters are available as defenses upon the trial and on appeal. Thus *Falbo* v. *United States*, denying entirely the right to urge the defense to the indictment that the order upon which it is based is invalid, *ipso facto* strikes out of the petitioner's path in this case the opinions of the court in the cases of *Johnson* v. *Hoy*, 227 U. S. 245; *Glasgow* v. *Moyer*, 225 U. S. 420; *Jones* v. *Perkins*, 245 U. S. 390; *In re Langaster*, 137 U. S. 393; *Riggins* v. *United States*, 199 U. S. 547, 551, which would have blocked petitioner's approach if the *Falbo* case had been decided otherwise.

Since the decision in *Falbo* v. *United States* is not determinative of the issues and the denial of the defense to the indictment was sustained, there is created thereby a more imperative demand for the writ of habeas corpus for the purpose of reviewing the order of the draft board upon which the indictment is based. By reason of the fact that petitioner was reported to the district attorney as a delinquent because he refused to obey the illegal order and in view of the action of the Department of Justice upon such report by arresting and proceeding to indict the petitioner, there is created a clear, immediate and great need for the writ of habeas corpus. He will be compelled to undergo a trial by ordeal and suffer pains and penalties inflicted under an act of attainder because conviction will be inevitable and he will be denied the right to be heard in his

defenses. See the *Petition for Rehearing* in *Falbo* v. *United States*, No. 73 October Term, 1943, pp. 7-37; 41-49.[5]

The petitioner, to protect his liberty, may invoke the powers of judicial review of the administrative action in the same way and to the same extent that persons have been permitted to invoke other *chancery writs* to protect their property from administrative action, such as the writ of injunction, without compliance with the administrative order prior to invoking the judicial powers of the federal courts. *Federal Radio Comm'n* v. *Nelson Bros. Bond & M. Co.*, 289 U. S. 266, 278; *Chicago, M. & S. P. Ry. Co.* v. *Minnesota*, 134 U. S. 418, 456-457; *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287, 289; and *Shannahan* v. *United States*, 303 U. S. 596. See also the *Petition for Rehearing* in the *Falbo* case, pp. 50-53.

Under statutes where administrative or judicial remedies are provided which subject the persons affected to heavy penalties or even light burdens as a condition precedent to judicial review this court has repeatedly held that the remedy of injunction in chancery is available to obtain judicial review of the administrative action questioned prior to compliance therewith. *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 53; *Missouri Pac. Ry. Co.* v. *Nebraska*, 217 U. S. 196, 207-208; *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331; *Wadley Sou. Ry. Co.* v. *Georgia*, 235 U. S. 651, 660-663; *Ex parte Young*, 209 U. S. 123, 147. See *Petition for Rehearing* in the *Falbo* case, pp. 29-33. Since habeas corpus, another chancery writ, stands on a much stronger ground, the Constitution, as a basis for protection of liberty of the person, than does the remedy of injunction, it

[5] In addition to the many cases and authorities cited in the petition for rehearing showing that the criminal sanctions clause of Section 11 of the Selective Training and Service Act of 1940 is a bill of attainder because not requiring and doing away with a judicial trial, see *In re Yung Sing Hee*, 36 F. 437; *Davis* v. *Berry*, 216 F. 413; *Pierce* v. *Carshadon*, 16 Wall. 234; *Calder* v. *Bull*, 3 Dall 386; *Green* v. *Shumway*, 39 N. Y. 423; *Kentucky* v. *Jones*, 10 Bush (70 Ky.) 725; *Gaines* v. *Buford*, 1 Dana (31 Ky.) 481, 510; *Watson on the Constitution* (Callaghan & Company), Vol. 1., pp. 733-739.

must be assumed that the court will hold that it is available to protect one from execution of administrative agencies which leads either to the guardhouse of the armed forces or the prisons of the Department of Justice. *Crowell* v. *Benson*, 285 U. S. 22, 58; *United States* v. *Idaho*, 298 U. S. 105.

Petitioner's claim that the draft boards' proceedings and order were the result of arbitrary and capricious action in violation of his rights secured by the due process clause of the Fifth Amendment and without according a fair hearing consistent with the "rudimentary demands of justice" is in effect a charge that the proceedings before the administrative agency was "an empty shell". (*Frank* v. *Magnum*, 237 U. S. 309, 345; *Bowen* v. *Johnston*, 306 U. S. 19, 26) The vital and substantial writ of habeas corpus cannot be frittered away on technical grounds or rules of convenience and of non-interference with administrative agencies.

The impending penalties of the administrative action by prosecution of petitioner under the criminal sanctions clause of the Act results in the deprivation of his personal liberty and his civil rights—an illimitable injury from which recovery is hopeless. The prosecution has the same banishing effect upon the defendant and removes him from society in much the same manner as does the deportation from the country of a person alleged to be an undesirable alien. It is necessary that habeas corpus be allowed to give relief for the same reason and same purpose to the person exempt from the liability for duty under the Act as the relief granted to the citizen wrongfully confronted with deportation. In each instance the administrative agency is without jurisdiction and if the court so finds upon the hearing of the writ it is the duty of the court to release the petitioner. *Lloyd Sabaudo* v. *Etling*, 287 U. S. 329; *Gonzales* v. *Williams*, 192 U. S. 1; *Ng Fung Ho* v. *White*, 259 U. S. 276, 284; *Kessler* v. *Strecker*, 307 U. S. 22, 34-35. See pages 68 to 70 of *Petition for Rehearing* in *Falbo* v. *United States*, supra.

It cannot be assumed that the Congress intended that the exempt person under the Act be required to report for induction as a condition to obtaining judicial review. Certainly Congress did not intend to destroy the very exemption which it created and cause inconsistent and unreasonable results. It has been held that an exempt person need not exhaust the administrative remedies before obtaining judicial review. In *Gonzales* v. *Williams*, 192 U. S. 1, "... she was not obliged to resort to the Superintendent or the Secretary." To the same effect is *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557. Furthermore, *habeas corpus* after induction is not an administrative remedy but is a judicial remedy and the court has held that a judicial remedy need not be resorted to before invoking the aid of the court. *Lane* v. *Wilson*, 307 U. S. 268; *Railr'd & W. Comm'n of Minn.* v. *Duluth St. R. Co.*, 273 U. S. 625.

The act of submitting to induction is not an administrative remedy contemplated by the Act but is satisfaction of the administrative order or process. It is a hollow formalism which need not be complied with. The law does not require the performance of a vain and needless thing before judicial powers can be invoked. *Utley* v. *St. Petersburg*, 292 U. S. 106. See the *Petition for Rehearing* in *Falbo* v. *United States*, pp. 34-38.

Judge Yankwich, in *Ex parte Stewart*, 47 F. Supp. 410, emphasizes the need of the writ of habeas corpus in this situation by saying: "The need for a competent authority to question the possible arbitrariness of a board is clearer, because of the fact that no questioning of the action of the Board is allowed in a prosecution resulting from disobedience of any of the orders issued by the Board. Were it otherwise, we should have an instance,—which our law abhors,—of finality of administrative action which might leave a person at the mercy or caprice of a lay board, without the power to review arbitrariness, abuses of authority or even lack of jurisdiction. Such a situation is inconsistent with the

doctrine of limited sovereignty, which is at the basis of our constitutional structure, and which postulates the existence in the individual of certain rights which he can assert against the sovereign power itself. And, perhaps the most fundamental of these rights is the right of freedom of person, of which the individual cannot be deprived, even in wartime, except through machinery which guarantees the fundamentals of due process." (See Yankwich, *The Constitution and the Future*, Ch. III) . . .

"Suppose he stands convicted. Would he be in a better position to raise the question whether he was legally inducted by suing out a writ against the warden of the penitentiary? Most certainly not. Then, why should he wait? The only real question here is: Is the petitioner being deprived of his liberty by virtue of the action of the board? The answer is, Yes, because he has been arrested for failure to obey the order of the board. And he does not have to wait until he has been convicted to challenge that order. One may raise the question of due process after conviction. But a person need not wait until then."

The petitioner has been caught up in a rapidly moving piece of military machinery specifically designed for speed so as not to allow judicial trial in defense to the indictment on the question of the invalidity of the order of the board which instituted the proceeding. This places him in the position of inevitable conviction and destruction of his rights of citizenship without the right to question the action of the board. He is certain to suffer pains and penalties of a modern-day trial by ordeal and by bill of attainder. It is from this predicament and type of proceedings that the ancient writ of habeas corpus first came into use. The writ was regularly employed by the chancellors to rescue the common people of England from the trials by ordeal and battle then in vogue in certain parts of England. It is respectfully submitted that the method of trying cases under the Act in question so as to deny the fundamental defense

is nothing but a revival of the trial by ordeal. (See main brief in the case of *Falbo* v. *United States*, pp. 23-39.) The trials are in violation of due process of law guaranteeing the right to be heard in defense to an indictment. (See *Petition for Rehearing* in the *Falbo* case, pp. 53, 61-65.) The proceedings under the Act are contrary to Clause 3 of Section 9 of Article I of the United States Constitution because they are by bill of attainder in which all semblances of a judicial trial are done away with.[6]

Under this type of proceedings under the indictment it is imperative that the writ of habeas corpus be granted so as to protect the rights of petitioner from gross violations of his constitutional rights.

Prior to the date set for induction by the board the petitioner was faced with a choice of taking a course that would lead him either into the military machinery, with loss of civilian rights and possible death penalty on court-martial proceedings for claiming his exemption and civilian rights, or into the hands of the Department of Justice to be convicted by bill of attainder in the district court. The right to the writ of habeas corpus, after induction growing out of penalties far more severe than could be inflicted in the district court, is thus nominal and illusory and fraught with difficulties and penalties so great that it is better to refuse to obey the order of uncertain legality rather than ask for protection of the writ of habeas corpus after induction. "He must either obey what may finally be held to be a void order or disobey what may ultimately be held to be a lawful order." (*Wadley Sou. Ry. Co.* v. *Georgia*, 235 U. S. 651, 663) "Obviously, a judicial review beset by such deterrents does not satisfy the constitutional requirements, even if otherwise adequate, and therefore the provisions of the act relating to the enforcement . . . are unconstitutional." (*Okl'a Operating Co.* v. *Love*, 252 U. S. 331)

[6] See petition for rehearing in *Falbo* v. *United States*, pp. 7-26.

Since it is obvious to all reasonable men that petitioner cannot get into the army once he has been found delinquent and prosecuted for violation of the act in a manner that is certain to send him to the penitentiary, it cannot be argued that the petition for writ of habeas corpus is a "litigious interruption" of the selective process. It is not any more an interruption of the process than were the habeas corpus proceedings in *Ex parte Crow Dog*, 109 U. S. 556, an interruption of the funeral proceedings and burial of the person killed by Crow Dog.

In determining the question of whether the district court erred in refusing to issue the writ and in dismissing the petition the court must accept all the allegations made in the petition as true. All reasonable intendments must be indulged in favor of the petition. The court in determining the legal effect of the facts alleged must consider them as conceded and true. *Truax* v. *Corrigan*, 257 U. S. 312, 332; *Mackay* v. *Dillon*, 4 How. 431; *Dower* v. *Richards*, 151 U. S. 658, 667; *State of Arizona* v. *State of California*, 284 U. S. 203; *Payne* v. *Central Pac. R. Co.*, 255 U. S. 228, 232. See also *Pyle* v. *Kansas*, 317 U. S. 213, and *Waley* v. *Johnston*, 316 U. S. 101. In *Holliday* v. *Johnston*, 313 U. S. 342, this court said "a petition for the writ ought not be scrutinized with technical nicety".

The district court should have granted the petition for writ of habeas corpus and reviewed the draft board proceedings, findings and order because it appears from the face of the petition that the same are void because they are (1) in excess of authority of the board, (2) beyond the jurisdiction of the board, (3) contrary to law, (4) without substantial evidence to support the action taken, (5) contrary to the undisputed evidence, (6) contrary to the Constitution by depriving the petitioner of rights and liberty without due process of law, and (7) arbitrary and capricious.

An independent inquiry can be made by the district court on any of the above matters, and in deciding the questions it is not bound by the findings or determinations

of the administrative agency, because each of the questions involved is judicial in its nature and none are administrative discretionary matters.

Since petitioner is a minister of religion under Section 5 (d) of the Act, the local board and appeal board acted in excess of their authority in not classifying him as a minister exempt from all training and service, and the order of the board is beyond the jurisdiction of the administrative agency. See petitioner's main brief in *Falbo* v. *United States,* pp. 58-66; 67-73. Also see the reply brief in same case, pp. 4-11. Reference is also made to the petition for rehearing in the same case, pp. 67-72.

The classification and action of the draft boards is alleged to have been in violation of the due process clause of the Fifth Amendment. Thus are presented for judicial review "jurisdictional facts" and a constitutional question. Compare statements in the petition for rehearing in the case of *Falbo* v. *United States,* pp. 72-75. For the reason that it is alleged that the action of the boards is contrary to the evidence and not supported by evidence it is also the duty of the court to permit review on habeas corpus, see *op. cit.* pp. 75-77. Furthermore there is a cause for action shown in the petition upon the action of the boards in their refusing to receive evidence, thus denying procedural due process, see *op. cit.* pp. 77-79.

This case presents to this court the vital and all-important question of whether upon a pretext and pretense of expediency and convenience the judiciary can apply a rule of non-interference with administrative action until its orders are complied with so as to deny and suspend the inalienable writ of habeas corpus. This great prerogative writ was enshrined by the people of the United States in the Constitution for the preservation and protection of their lives and liberty and for that of their posterity. These blessings of liberty cannot be thrown overboard to mollify the demands of those who are clamoring for a destruction of the institutions of democracy on the *home front* as a price

for effective prosecution of the war, because the only basis professed for maintenance of the war is to preserve these heritages. This court is under a solemn obligation and oath before Almighty God to the people of the United States not to surrender to the demands of governmental agencies, the people's jewels, their treasures and ideals locked in the Constitution by the founding fathers.

If the judgment of the court below be sustained and the right to the writ of habeas corpus be denied for the reasons stated by the courts below, then the hands of time have been violently turned back to that era of darkness in which the forefathers lived in England from the reign of Henry VII to Charles I. During that time two tribunals, the Court of Star Chamber and the Court of High Commission, both administrative agencies, were manufactured by the king. These two agencies, as abundantly shown by history, exercised a most fearful authority over the people. Against their excesses and abuses the most upright and conscientious judge could not afford relief, because of technical rules invoked by the crown which had the effect of suspending the writ of habeas corpus. This condition of suppression of the people's liberty raised an uproar, which ended in revolution, the trial and decapitation of Charles I, and the establishment of the Commonwealth under Cromwell, who restored many of the liberties of the people, including the writ of habeas corpus. In 1861 *Mr. Lincoln* said: "If by the mere force of numbers a majority should deprive a minority of any clearly written constitutional right, it might, in a moral point of view, justify revolution —certainly would if such a right were a vital one." (*Voices of Democracy,* Government Printing Office 1941, p. 11)

Although, because of the lack of express restraint in the Constitution, it may be said by the court that Congress can deny an inquiry in a criminal case as to the illegality of the order of an administrative agency upon which the indictment is based because of the need to mollify the demands of expediency advanced by those in charge of the

war effort, no court can for the same reason deny and suspend the people's right to the writ of habeas corpus. To do such would result in committing innocent persons to prison by fiat of an administrative agency and deprive them of their liberty as summarily as if they were thrown into a dungeon without a judicial hearing. If permitted, it is plain that a condition similar to that which existed under the Court of Star Chamber has been created through the resurrection of alien, ancient and tyrannical theories applied by the cruel and wicked kings of England who drove liberty-loving men to this country to cut and clear out of the wild forests of this continent the beginning of this nation dedicated to the proposition that such intolerable conditions from which they fled shall not be resurrected by intrigue, invasion, rebellion, war, expediency or judicial sophistry. The courts below have done just that. It appears necessary that this court destroy this strange, alien, and freakish product which was engendered, brought forth, and nurtured by the courts below, to the end that the liberty of the people and right to the writ of habeas corpus shall remain secure.

"Tyrannical governments had immemorially utilized dictatorial criminal procedure and punishment to make scapegoats of the weak, or of helpless political, religious or racial minorities and those who differed, who would not conform and who resisted tyranny. The instruments of such governments were, in the main, two. Conduct, innocent when engaged in, was subsequently made by fiat criminally punishable without legislation. And a liberty-loving people won the principle that criminal punishments could not be inflicted save for that which proper legislative action had already by 'the law of the land' forbidden when done. But even more was needed. From the popular hatred and abhorrence of illegal confinement, torture and extortion of confession of violations of the 'law of the land' evolved the fundamental idea that no man's life, liberty or property be forfeited as criminal punishment for violation of that law until there had been a charge fairly made and fairly tried in

a public tribunal free of prejudice, passion, excitement, and tyrannical power. Thus as assurance against ancient evils, our country, in order to preserve 'the blessings of liberty', wrote into its basic law the requirement, among others, that the forfeiture of the lives, liberties or property of people accused of crime can only follow if procedural safeguards of due process have been obeyed.

"The determination to preserve an accused's right to procedural due process sprang in large part from knowledge of the historical truth that the rights and liberties of people accused of crime could not be safely intrusted to secret inquisitorial processes. The testimony of centuries, in governments of varying kinds over populations of different races and beliefs, stood as proof that physical and mental torture and coercion had brought about the tragically unjust sacrifices of some who were the noblest and most useful of their generations. The rack, the thumbscrew, the wheel, solitary confinement, protracted questioning and cross questioning, and other ingenious forms of entrapment of the helpless or unpopular had left their wake of mutilated bodies and shattered minds along the way to the cross, the guillotine, the stake and the hangman's noose. And they who have suffered most from secret and dictatorial proceedings have almost always been the poor, the ignorant, the numerically weak, the friendless, and the powerless . . .

"We are not impressed by the argument that law enforcement methods such as those under review are necessary to uphold our laws. The Constitution proscribes such lawless means irrespective of the end. And this argument flouts the basic principle that all people must stand on an equality before the bar of justice in every American court. Today as in ages past, we are not without tragic proof that the exalted power of some governments to punish manufactured crime dictatorially is the handmaid of tyranny. Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are non-conforming victims

of prejudice and public excitement. Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death. No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion."—Justice Black in *Chambers* v. *Florida,* 309 U. S. 227, 236-238, 240-241.

May it please the court to answer this question: Which is more reprehensible, conviction based on confessions obtained by torture, or conviction secured without requiring the prosecution to prove guilt, under Sec. 11 of the Selective Training and Service Act of 1940, where judicial trial is done away with by bill of attainder? Both are condemned in the Constitution. Is not habeas corpus available to rescue the innocent victim from the chains of either? The mere asking of the question echoes down through the corridors of decades the answer of the courageous men who wrote the Constitution of the United States.

Conclusion

Upon the above considerations it is respectfully submitted that this court should reconsider its ruling in *Falbo* v. *United States* which makes necessary the granting of the writ of habeas corpus to petitioner; and that this court should grant the petition for writ of certiorari so as to correct the errors complained of here and committed by the courts below against the petitioner and against the Constitution of the United States.

Respectfully submitted,

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